No. 697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

LEON CHARLES WEISS,

Petitioner,

versus

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a rehearing be granted of the petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit filed herein and denied on the 24th day of November, 1941.

QUESTIONS PRESENTED BY FORMER PETITION

The petition filed herein presented the following questions:

1.—The indictment (and particularly Count 1 thereof, on which petitioner has been sentenced to five years in the penitentiary) was duplicitous, in that it charged petitioner, in each count, with participation in two separable alleged frauds; that the mailing charged in Count 1 ante-dated, and could not have been in execution of, the later and subsequent alleged fraud; that in defiance of the government's only evidence as to the time of origin of the later alleged fraud, showing its subsequent conception in the mind of petitioner's alleged accomplice to have been **after** the mailing by petitioner of the letter described in Count 1, the trial judge still charged the jury that there was only one scheme to defraud involved in the case; and the confused issues of alleged fraudulent conduct before, and alleged fraudulent conduct after, the time of the mailing in Count 1 were thus left to the jury.

2.—That, under the theory of "system" or "intent" evidence, proof of collateral matters was admitted before the jury which exceeded legitimate bounds of such evidence; particularly in the case of the admission of a certain $75,000.00 check connected with Dr. James M. Smith, former president of Louisiana State University, which should not have been admitted against petitioner at all; but which, as admitted, was allowed on a false predicate of fact, assumed by the trial judge and argued by the district attorney, and immediately after the trial, by newly discovered evidence, was indisputably disclosed to have been false and erroneous; and yet a new trial to remedy this gross injustice to petitioner has been refused.

ARGUMENT

We respectfully urge upon this Court a reconsideration of the issues of this case, because we believe that the accused was not fairly tried on a proper single issue of guilt or innocence, and because highly prejudicial evidence which was later recognized to have been wholly false was permitted to go to his jury.

1.

Under the constitutional requirements of both the Constitution of the United States and the constitutions of all of the various states, it has been always required as basic elements of criminal procedure against a citizen in this nation that he should be fully and precisely informed of the cause and nature of the accusation against him, and such accusation should be tried by a jury of his fellow citizens, and, in the federal courts, his guilt must be unanimously agreed upon. Such requirements of constitutional law inevitably mean, and have been uniformly held to mean, that the accusation must embrace a single and definite charge of crime and that the necessary unanimity of the jurors in a federal court must be directed to the single offense thus charged.

Both of these cardinal principles of our organic law have been violated in the trial of petitioner, and it is difficult for us to understand why the highest tribunal in the land fails to recognize the injury which has been done to petitioner, because we are sure that if the violation of his fundamental rights was recognized prompt relief by this writ of review would be extended to him.

As we have tried to point out in our previous pleadings, Weiss was tried on a confused accusation that he had committed a fraud in one year, and in the same

count he was charged with committing a different fraud in another year, and the prosecution set a net to catch him, by alternative, for either offense by claiming that a letter written at a time mid-way between the two alleged fraudulent schemes was in execution of a single continuous scheme.

There was no proof to support a presumption of continuity or connection between the two alleged fraudulent devices, even if in a criminal case a presumption could have been resolved against the defendant rather than a showing made by affirmative proof beyond a reasonable doubt. On the contrary, rather than there existing any presumption of continuous fraudulent design against the defendant, the only evidence as to the time of the origin of the second alleged fraudulent scheme, evidence produced by the government itself, showed that said subsequent transaction had not even been conceived in the mind of the chief actor, of whom the present petitioner was only alleged to have been an accomplice, until after the letter referred to in said count of the indictment had been mailed.

We respectfully refer the court again to what has been said on this subject in our original brief in support of this application for a writ of certiorari, and in our reply brief on behalf of petitioner to the brief for the United States in opposition. We think that in what we have previously written and submitted to the court we have covered the subject clearly and logically, and have shown the error of the contrary contentions made by government counsel. These gentlemen of the opposition have relied upon a number of citations of authority which are sound law in the type of case that they relate to. The case at bar, however, is distinguishable and falls rather within the doctrine of the case of *United States vs. Buck-*

ner, 108 Fed. (2d) 921, and should be decided in accordance with the principles expounded in that decision.

A practical and unanswerable circumstance in the case at bar, demonstrating the constitutional irregularity of the manner of petitioner's trial is that even today, over a year since the verdict was rendered nobody connected with the case, judge, lawyers or defendant, is able to know what the jury actually decided, whether any or all of them found that Weiss was guilty of fraud in the matter of the raising of a contract price in the year 1936, or whether any or all of them found that he was guilty of knowingly approving an inflated bill of the contractor for extras in 1937.

It is the remarkable instance of a man tried simultaneously and alternatively on two separate and distinct sets of facts, each supposed to constitute a fraudulent scheme, and who may go to his grave without ever knowing whether all twelve of his jurors believed unanimously that he was guilty of fraud in either or both of said transactions.

2.

We have very thoroughly reviewed the history of the so-called "intent" evidence the prosecution was permitted to use in this case, and particularly the matter of the $75,000.00 check connected with Dr. James Monroe Smith, former president of Louisiana State University, which the prosecution was allowed to put in evidence before the jury. There is nothing which we can add to the facts of this matter as we have already carefully reviewed them in our previous briefs.

That any evidence tending to connect the defendant on trial with the aforesaid Dr. Smith, then serving time in the Louisiana State Penitentiary, would be highly prejudicial to the accused, was conceded by the trial judge

at an early period in the hearing; that such a showing of a connection between the two men was later allowed to be made to the jury by means of this check is a matter of record. And that the inferences drawn from the check before the jury by the district attorney, and which inferences were the basis of the court's admission into evidence of the check, were discovered immediately after the case had closed to have been completely false and erroneous, is also a matter of record.

How such a serious and undeserved prejudice of defendant's rights can be allowed to go unnoticed is as difficult for us to understand as is the failure, already commented on, to recognize the improper method of trying defendant simultaneously on allegations of two disconnected frauds. We can only call these matters again to the attention of the Supreme Court of the United States in the hope that our petition, and the supporting brief, may again be examined, and that in the great discretion which is vested in the highest tribunal in the land to protect from harmful error citizens who are charged with crime, a review of the judgment against this petitioner may still be granted.

Respectfully submitted,

HUGH M. WILKINSON,
JOHN D. LAMBERT,
Attorneys for Petitioner.

I hereby certify that the above petition for a rehearing is filed in good faith upon a real and substantial ground, and not for mere purpose of delay.

Dated, New Orleans, Louisiana, December 17th, 1941.

HUGH M. WILKINSON,
Of Counsel for Petitioner.